

# Testimony of Mick Pattinson

Hearing of the Little Hoover Commission

April 24, 2008

## *Water Quality Regulation in California*

Good morning. My name is Michael Pattinson. I am the President and CEO of Barratt American, a Carlsbad-based homebuilding company that has operated in California since 1980 and that has built over 18,000 homes in that period of time. Barratt American is involved in both urban and suburban residential and commercial development.

I am representing the views of California's homebuilding industry and its state association, the California Building Industry Association, or "CBIA". I served as the 2002 Chairman of CBIA and now serve on several policy committees, including the Impact Fee Task Force, of which I'm Chairman.

I am particularly pleased that the Little Hoover Commission is looking into the water-quality policies of California and the implementation and regulation of those policies at the state and local levels of government. While making water quality a top priority of the state is certainly something that most Californians, including homebuilders support, I'm certain you are finding through your investigation that little is known about the state's water-quality policies or how they are carried out, except by the regulators and those of us who are regulated.

### **The public policy**

Water quality is both a matter of public health and environmental protection and, accordingly should be a high public policy priority of state government. So, what happens to water quality between its source and a household tap should be a major pre-occupation of the state. Likewise, the health of beaches, lakes and streams depends on a watchdog government and measures to protect the quality of water endemic to these areas – for the benefit of both humans and the various species of vegetation and other living things that make these areas their homes.

The accomplishment of such an important public policy as ensuring water quality – particularly in a state as big and as populated as California – demands that it be clear and carried out systematically and efficiently. And, of course, any policy such as this one has to be practical and balanced against other policies and priorities.

Indeed, the management and regulation of water quality for human consumption or guaranteeing a healthy environment should be well-established as a state policy and efficiently administered through accountable regional or local agencies. And, California homebuilders certainly understand that they have an obligation and a role to play in ensuring that high water quality is achieved in connection with what they do. But, while the state water quality policy and regulatory regime – as it relates to stormwater runoff – is apparently set up to meet that basic standard, it falls well short in practice of meeting that standard.

## **Policy-making**

The homebuilding industry in California must comply with increasingly stringent stormwater quality policies and regulations but it's become difficult to ascertain the basis for these policies and regulations or what affect they have on improving water quality. The recently released draft general construction stormwater permit ("the Permit") provides a good example. Central to the Permit are the rigors homebuilders must follow to manage the quality and velocity of water running off their construction sites during storm events. While the standard for this management over the past decade has been "best practices" (BMPs), all of which must be spelled out in individual project "stormwater pollution prevention plans" (SWPPPs), which are approved by the State Water Resources Control Board (SWRCB) and enforced by regional water quality control boards (RWQCBs), the SWRCB is proposing a radical change that sets an arbitrary numeric standard for sediment content in stormwater.

Despite observations by a SWRCB-commissioned "blue ribbon" panel of experts that the SWRCB lacked the data to know how to set such a standard or that neither the technology nor the science existed to support this regulatory approach, the SWRCB is pursuing it anyway. And, no evidence has been presented to show that BMPs aren't working or that adopting the numeric effluent limit (NEL) approach would improve water quality. Indeed, while the NEL regulatory regime requires that water running off a construction site must achieve a high purity level, the waterway into which it flows ("receiving waters") likely has more sediment-laden (dirtier) water running through it. CBIA questions the water-quality value and general logic of such a policy.

That violations of the Permit's requirements include criminal penalties make the state policy evermore absurd. It's like putting up a stop sign in the middle of a roadway with no intersection. California homebuilders think there is a better way, something I will address at the close of my testimony.

Another profound inconsistency and impracticality in stormwater policy is the proposal of the SWRCB that permittees adhere to state-based "hydromodification" requirements. Hydromodification refers to changes in the size and shape of streams due to increases in hard surfaces following development that transfer water at a rate and volume different than pre-development conditions. Hydromodification controls that capture water runoff and release it slowly before it enters a stream attempt to minimize the effects of uncontrolled runoff. Managing hydromodification typically requires homebuilders to incorporate design modifications into their development plans, something demanded early enough in the development process to make those design changes possible and practicable. By proposing new hydromodification requirements in the Permit – which is issued just before construction begins and well after it's reasonable to make design changes to a project – the SWRCB is imposing an unworkable new burden on permittees and questionable water-quality benefit.

Other policies like requiring expensive and unproven advanced stormwater sediment treatment systems should be reconsidered. In addition, imposing land grading bans for extended periods of time – in some cases for more than a half year – is not practical. No other commercial enterprise in California is asked to close up shop for six months each year. There's got to be other answers.

## **Governance**

"Gotcha" regulation of stormwater is made worse by the freedom its governance in California allows nine regional regulator boards – the RWQCBs – to set their own individual rules and not be accountable to anyone, let alone the SWRCB, the presumptive, central water-quality policy-maker. While the RWQCBs are theoretically strategically placed to carry out the water-quality objectives of the state – pursuant to both the federal Clean Water Act and the state's Porter-Cologne water law – they don't.

The principle responsibility of RWQCBs is to approve what are called municipal stormwater permits (also known as MS4 permits), which are established to assure that local governments are complying with state water quality policy. And, they are in place to enforce state regulations and permits.

Despite the regulatory design, however, the RWQCBs operate independently of the SWRCB and, frequently, in direct conflict with state water quality dicta. RWQCBs in essence can establish its own policy to deal with a specific issue. In those instances where the SWRCB has adopted a policy or guidance document, RWQCBs are free to interpret and implement such policy directives in their own way, no matter how excessive or costly the impacts.

To illustrate, in my home town of San Diego the RWQCB issued a so-called MS4 permit in January of 2007 that imposed post-construction requirements on new housing projects that nearly defy description. Concerned about the contaminants that might flow from someone washing their car or fertilizing their lawn, the RWQCB required as part of their MS4 permit that homebuilders ensure that each lot to be built upon not allow any more than five percent of water it might discharge actually flow from it. In other words, 95 percent of stormwater must be retained on each lot. And, while you might imagine this extraordinary requirement might be met by building a centrally located cistern to receive the runoff and manage its subsequent release, the RWQCB wouldn't allow it. Instead, the RWQCB has embarked on an aggressive strategy that mandates house-by-house capture and treatment and infiltration of storm water rather than concentrate time, resources, and efforts on treating urban runoff on a watershed basis, which would be much more effective approach to the problem. The remediation concepts being considered by San Diego homebuilders to satisfy the terms of the MS4 permit would add roughly \$30,000 to the cost of a newly built home – essentially the cost of a subterranean cistern dug in front of and maintained for every new house in the subdivision.

The new requirement to infiltrate stormwater runoff onsite may work in some parts of the country with porous well-draining soils, but in a location like San Diego with expansive clay soils which drain poorly, infiltration presents major challenges both to design and public safety, challenges that have been raised by both the public and private sector, and unfortunately, challenges that were flatly ignored by the RWQCB when it developed these new requirements.

Important to note, the Chair of the SWRCB flew from Sacramento to San Diego to discourage the RWQCB from adopting this onerous new rule. But, she was virtually ignored – dismissed like everyone else after three minutes of testimony. That's no way to conduct state policy.

As for the fairness of the process, the regulated community is frustrated by the fact that members of the SWRCB and the nine RWQCBs say they are unapproachable under state law. While it is perfectly acceptable and appropriate to speak with elected city, state and federal officials, it is unfathomable that the same rights do not apply to unelected board members. With the power to impose billions of dollars in economic impacts, these board members have a duty to meet with those they regulate.

The regulated community also takes issues with the absence of a clear quantifiable economic analysis associated with permit requirements. This vague approach to an economic review fails to accurately and responsibly calculate the economic consequences of these actions. The estimated cost given by the San Diego RWQCB for last year's permit \$5,000 per home – which is a lot of money for most California families. But, this estimate is far from accurate. Instead, the requirement – which, again, means the construction of an underground swimming pool in front of each new home – adds closer to \$30,000 per home. This includes indirect cost increases due to staff time, insurance and construction delays.

An April 6, 2006 report by David Sunding and David Zilberman from UC Berkeley, *A Guide To Consideration Of Economics Under The Porter Cologne Act*, challenges the validity of water board economic analysis the puts forth a detailed mythology in order to correctly evaluate economic impacts. They write, "While the requirement to consider economics under Porter-Cologne is absolute, the legislature and the courts have done little to particularize this requirement."

According to the San Diego Association of Governments, approximately 300,000 new units will be built in the region by 2030. *At \$25,000 per unit this amounts to a \$7.5 Billion impact to the housing industry.* And through all this, existing urban runoff continues to flow into our storm drains and little progress will be made on this much larger problem.

For example, with only 4% of its remaining land left for development, the City of San Diego is approaching its limits of outward growth and future growth is planned for existing urbanized areas. Future growth is planned to occur on about 10% of the city's existing urbanized areas. Given this scenario where the city grows out by 4% and up on 10%; 30 years from now over 85% of the city will remain largely unaffected by the regional board's regulations because it will not have undergone redevelopment.

A regulatory body whose decisions can cost billions of dollars to American citizens has a duty to ensure that every effort has been made to provide realistic, accurate and comprehensive economic data.

### **A better way**

To its credit, the SWRCB is undergoing a strategic planning process which will, I'm told, focus on this profound lack of coordination between and accountability of regional and state regulatory agencies. It is hoped that, at a minimum, greater guidance from and tougher management by SWRCB – to ensure a minimum level of regulatory consistency and continuity throughout the nine regulated regions – will result. But, greater action is needed if California is to meet its water-quality goals in a meaningful and economically effective way.

The state needs to take immediate steps – both short-term and long-term – to resolve the imbalance and impracticality of its water-quality regulations as well as the discontinuity of their implementation and enforcement. Those actions should focus assessing both the benefits of their policies and weigh those benefits against the cost to California and its economy. And, the SWRCB should not have to apologize or be defensive about considering factors such as economics, housing and the facility of achieving water quality goals when developing its policies. In addition, the SWRCB must ensure that as agents of those policies, RWQCBs must be held fully accountable for how and how effectively they are administered.

On the policy front, the SWRCB should first go back to the basics: assessing the effectiveness of basin plans in meeting federal and state water-quality objectives. Basin plans – thought when adopted in the 1970s to be the core regulatory document for setting and meeting the state's water-quality standards – look back upstream to determine what should be done to ensure that the final discharge into a protected water body is at the level of quality the law and the public demands. Counting specks of sediment from an individual project well upstream does little to achieve that goal, unless it's part of a comprehensive strategy that progressively improves the quality of water as it rushes to the sea – something a basin plan can produce.

California homebuilders, for example, believe that an "upstream" perspective can lead to more efficient, economic choices for purifying water as it runs downhill. Regional, watershed-based strategies are being tested today and may open up new possibilities for doing the state's water-quality work more effectively without disproportionate burdens being borne by individual permittees.

Finally, something's got to give immediately on the governance front – and fast. If it's important and smart to get the policy right at the state level, it follows that regional enforcers do the same.

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